United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

B P/S

74-1241

To be argued by:
EDMUND W. O'BRIEN

United States Court of Appeals
FOR THE SECOND CIRCUIT

ORT MORTORO,

Appellant,

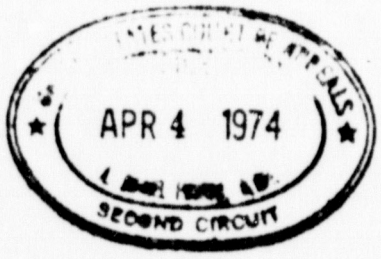
against

JOHN C. MANSON, Commissioner of Corrections for the State of Connecticut,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR APPELLEE, JOHN C. MANSON



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United States Court of Appeals
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BRIEF FOR APPELLEE, JOHN C. MANSON

Issue Presented

Is a denial of bail for cause by a state court, pending appeal, reviewable by a federal district court on a habeas corpus application?

ARGUMENT

I

The Bail Reform Act does not apply to a habeas corpus application by state prisoner in federal district court.

The Bail Reform Act of 1966 applies to

> "any criminal offense, other than an offense triable by court-martial, military commission, provost court,

> or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress." 18 USC Sec. 3152 (b).

It does not apply to one charged with a state offense. *United States ex rel. Brown* v. *Fogel,* 395 F. 2d 291 (4th Cir. 1968); *Gilmore* v. *California,* 364 F.2d 916 (9th Cir. 1966) (cert. denied, 90 S.Ct. 1529, 1970).

And the act does not apply to

> "collateral attacks on sentence . . . [and] . . . it does not apply to state prisoners at all." *Ballou* v. *Massachusetts,* 382 F.2d 292, 293 (1st Cir. 1967).

II

Bail pending appeal is not a constitutional right.

> "The constitutional right to bail is lost after conviction. Since there is no constitutional right to appeal (*Griffin* v. *Illinois,* 351 U.S. 13, 18 (1956), *McKane* v. *Durston,* 156 U.S. 684, 687-688 (1894)) there is no constitutional right to be free pending appeal . . ." *United States ex rel. Siegal* v. *Follette,* 290 F. Supp. 632, 635 (S.D.N.Y. 1968); *United States ex rel. Collins* v. *Jozwiak,* 315 F. Supp. 188 (Wis. 1970).

> "It is well established that bail after conviction in the trial court is a matter of sound discretion of that court, and that a convicted appellant cannot demand bail as a matter of right." *Smith* v. *United States,* 434 F. 2d 612 (5th Cir. 1970); *Mastrian* v. *Hedman,* 326 F. 2d 708, 711 (8th Cir. 1964); *United States* v. *Piper,* 227 F. Supp. 735, 740 (N.D. Tex. 1964).

III

District Court, without supervisory responsibility over state court, properly refused to substitute its discretion for that of trial court.

"A state prisoner has no absolute federal Constitutional right to bail pending appeal. *Sellers* v. *Georgia*, 374 F.2d 84 (5th Cir. 1967); . . . *See also United States* v. *Motlow*, 10 F. 2d 657 (7th Cir. 1926); *Rehman* v. *California*, 85 S.Ct. 8, 13 L. Ed. 2d 17 (1964)." *Bloss* v. *People of State of Michigan*, 421 F.2d 903, 905 (6th Cir. 1970).

"The United States District Courts do not, of course, sit as appellate courts to review the use or abuse of discretion of the state courts . . . in granting or withholding bail pending final appeal." *Bloss, supra*, at 906.

"There might have been room for a difference in judgment on the amount of bail, but consideration by a federal court could not be asked or given upon that basis. A federal court would not be entitled to act in substitution of judgment for that of the state court. What the state court did would have to be beyond the range within which judgments could rationally differ in relation to the apparent elements of the situation. It would have to amount in its effect to legal arbitrariness in the administration of the bail right provided, so as to constitute a violation of due process, or to discriminatoriness in the application of the right as against petitioner, so as to constitute a violation of equal protection." *Mastrian* v. *Hedman*, 326 F.2d 708, 711 (8th Cir. 1964).

"We have said time and again that the Fourteenth Amendment does not assure uniformity of judicial decisions . . . [or] immunity from judicial error . . .

Milwaukee Electric Ry and Light Co. v. *Wisconsin ex rel. Milwaukee,* 252 U.S. 100, 106, 40 S.Ct. 306, 309, 64 L. Ed. 476 (1920). Were it otherwise every alleged misapplication of state law would constitute a federal constitutional question." *Beck* v. *Washington,* 369 U.S. 541, 554-555, 82 S. Ct. 955, 962-963 (1962); *Rehman* v. *California,* 85 S.Ct. 8 (1964); *Sellers* v. *Georgia,* 374 F. 2d 84 (5th Cir. 1967); *Kimes* v. *Swenson,* 292 F. Supp. 361 (Mo. 1968).

IV

Authorities relied upon by Petitioner concern application of Bail Reform Act (or its predecessor) and Jurisdiction of Supreme Court ancillary to determination of petition for writ of certiorari.

The Bail Reform Act of 1966 provides that a person convicted of crime in a federal court "shall be entitled to bail pending appeal" (with specified exceptions), 18 USC 3146, 3148. And 18 USC 3144 appears to give the Supreme Court jurisdiction to release on bail persons whose state convictions that court is reviewing. In none of those decisions has the court found jurisdiction in a federal district court to determine a state prisoner entitled to bail in a habeas corpus proceeding such as this one. *Chambers* v. *Mississippi,* 405 U.S. 1205, 92 S.Ct. 754, 30 L. Ed. 2d 773 (1972); *Harris* v. *United States,* 404 U.S. 1211, 92 S.Ct. 10, 30 L. Ed. 2d 25 (1971); *Sellers* v. *United States,* 393 U.S. 6, 89 S.Ct. 36 (1968); *Sica* v. *United States,* 82 S.Ct. 669 (1962); *Herzog* v. *United States,* 75 S.Ct. 349, 99 L. Ed. 1299 (1962); *Weaver* v. *United States,* 405 F. 2d 353 (D.C. Cir. 1968); *United States* v. *Ursini,* 276 F. Supp. 993 (Conn. 1967). And none relate to a bail statute, controlling in this case, which provides the convicted person *"may be released."* Sec. 54-63f., General Statutes of Connecticut.

CONCLUSION

While the material in the Appellee's appendix amply supports the discretionary denial of bail pending appeal by the trial judge, it is respectfully urged that the judgment of the District Court be affirmed for the reason that such denial of bail is not reviewable by the District Court in a petition for habeas corpus.

Respectfully submitted,

JOHN C. MANSON, Commissioner of Corrections for the State of Connecticut

By: EDMUND W. O'BRIEN
State's Attorney for
New London County
302 State Street
New London, Connecticut 06320

ADDENDUM

SEC. 54-63f., GENERAL STATUTES OF CONNECTICUT

Sec. 54-63f. Release after conviction and pending sentence or appeal. A person who has been convicted of any offense and is either awaiting sentence or has given oral or written notice of his intention to appeal or file a petition for certification or a writ of certiorari may be released pending final disposition of the case, unless the court finds custody to be necessary to provide reasonable assurance of his appearance in court, upon the first of the following conditions of release found sufficient by the court to provide such assurance: (1) Upon his execution of a written promise to appear, (2) upon his execution of a bond without surety in no greater amount than necessary, (3) upon his execution of a bond with surety in no greater amount than necessary. (1967, P.A. 549, S. 14.)

Bail hereunder is entirely disconnected from preconviction bail and presumption of innocence and should be granted with great caution. 159 C. 264.

APPENDIX

Finding by Trial Judge.

3/ "Service of sentence by the defendant in this case is hereby directed pursuant to *General Statutes*, § *54-95, as amended*, notwithstanding his notice of election not to commence such sentence.

"The following reasons are assigned:

"1. Defendant has been convicted of a serious crime pertaining to the sale of a narcotic drug.

"2. The offense occurred approximately five years ago.

"3. This is the defendant's second conviction by a jury, the first having been set aside on the ground of possible prejudice in the admission of certain parts of tape recordings which on the second trial were excluded.

"4. Now the proof of the crime is evident and the preconviction presumption of innocence has been lost.

"5. This second appeal is deemed to be only for the purpose of delay."

Response of John C. Manson, Commissioner of Correction for the State of Connecticut.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H-84

ORT MORTORO

vs.

JOHN C. MANSON, Commissioner of Correction for the State of Connecticut

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1. The respondent admits the allegations contained in Paragraphs 2, 4 and 5 of the petition.

2. The respondent denies the allegations contained in Paragraphs 1 and 3 of the petition.

3. The court which entered the direction for the service of sentence had before it the following facts:

1. Petitioner's previous conviction, appeal and reversal of conviction by the Connecticut Supreme Court on February 16, 1971. (Exhibit A)

2. The transcript of the recording of conversation between the petitioner and one David which was held by the Supreme Court to be erroneously admitted in evidence in the first trial. (Exhibit B)

4. After the reversal of conviction by the Connecticut Supreme Court on February 16, 1971, on May 23, 1971

Response of John C. Manson, Commissioner of Correction for the State of Connecticut.

David, whose testimony is mentioned in the Supreme Court opinion and in detail in Exhibit B attached hereto, was found floating in a quarry in Portland, Connecticut, having been shot in the back, chest and left arm by two .38 caliber lead bullets and was therefore not available to testify at petitioner's second trial.

Respectfully submitted,

THE RESPONDENT,
JOHN C. MANSON, Commissioner of Correction for the State of Connecticut

By /s/ EDMUND W. O'BRIEN
State's Attorney for
New London County

Certificate of Service.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H-84

ORT MORTORO

vs.

JOHN C. MANSON, Commissioner of Correction for the State of Connecticut

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I, EDMUND W. O'BRIEN, State's Attorney for New London County, attorney for John C. Manson, Commissioner of Correction for the State of Connecticut, hereby certify that on the 12th day of July, 1973 I served the within appearance and response upon the said Ort Montoro by depositing a copy of same in the U. S. Mails, postpaid, addressed to Richard R. Stewart, Esq., 50 Main Street, Hartford, Connecticut 06103, his attorney of record.

/s/ EDMUND W. O'BRIEN
Edmund W. O'Brien
State's Attorney for
New London County
302 State St., P.O. Box 1089
New London, Connecticut 06320

Exhibit A.

SUPREME COURT

January Term, 1971

STATE OF CONNECTICUT *v.* ORT MORTORO

Information charging the defendant with the crime of being an accessory to the attempted sale of narcotics, brought to the Superior Court in New London County and tried to the jury before *Devlin, J.*; verdict and judgment of guilty and appeal by the defendant. *Error; new trial.*

Richard R. Stewart, for the appellant (defendant).

Edmund W. O'Brien, state's attorney, for the appellee (state).

ALCORN, C. J. The defendant, Ort Mortoro, was convicted by a jury of the crime of being an accessory to an attempted sale of narcotic drugs. In this appeal from the judgment rendered on the verdict the defendant contends that the court erred in denying his motion for a separate trial, in denying his motion to set aside the verdict, in admitting evidence obtained by an electronic listening device and a tape recording, and in admitting prejudicial evidence.

We find the determinative issue in this case to be the prejudicial effect of one of the recordings which were admitted in evidence. However, in view of the new trial which must be ordered, we find it necessary to consider the rulings on evidence which were attacked on the ground that they violated the defendant's rights under the fourth amendment to the constitution of the United States. That question is distinct from the attack made on one recording on the ground of prejudice.

Exhibit A.

The defendant claims that the introduction into evidence of two tape recordings and the testimony of a police officer relating to conversations between the defendant and a police informer were a violation of his rights under the fourth amendment to the constitution of the United States.

The state claimed to have proved that an individual, whom we will refer to as the informer, had sold several cases of stolen liquor to the defendant in March or April, 1967. At that time, the defendant asked the informer if he knew of anyone who would be interested in acquiring a quantity of narcotics and took the informer to the home of Joseph Harb, where narcotics were displayed and the sale price was discussed. The informer told the defendant that he would get in touch with him if he found anyone interested. In August, 1967, while confined in the Montville Correctional Center, the informer sent for a county detective and told him of the narcotics which he had seen under the circumstances described.

In March, 1968, the informer telephoned to the defendant and, with the informer's consent, the call was monitored by a county detective and a tape recording of it was made. In the conversation the informer asked the defendant whether Harb still had the narcotics and the defendant said he did not know but that he would find out and asked the informer to call him the next day. On April 2, 1968, the informer went to the defendant's place of business and at that time he had a tape recorder concealed under his coat. At this meeting there was a further conversation relative to whether Harb still had narcotics on hand.

During the trial, the county detective who had listened in on the March telephone call was permitted, over the defendant's objection, to relate the conversation which he had overheard between the informer and the defendant. Later, the defendant was asked, on cross-examination, for his version of the March telephone conversation and, to

contradict his version, the tape recording of the conversation was played and a transcription of it was read to the jury over the defendant's objection. During the same cross-examination the defendant denied having any conversation with the informer regarding narcotics and the state offered the tape recording of the April 2 conversation and a transcription of it, both of which were admitted into evidence over the defendant's objection. Both recordings were offered for the purpose of attacking the defendant's credibility.

In this appeal the defendant claims that the county detective's recital of the overheard telephone conversation, the recording of that conversation, the recording of the April 2 conversation, and the transcriptions thereof were inadmissible. Thus, we are confronted with (1) the testimony by a witness for the state concerning a telephone conversation overheard with the consent of one of the parties to the conversation, (2) the admission into evidence of a recording of that conversation in order to attack the defendant's version of the conversation which he did not know was overheard, and (3) the admission into evidence of a recording of a conversation with the defendant, made by a device carried by a consenting informer without the knowledge of the defendant and used to attack the defendant's credibility. We are satisfied that the admission of this evidence, in each instance, did not violate the defendant's fourth amendment rights.

In *On Lee* v. *United States*, 343 U.S. 747, 72 S. Ct. 967, 96 L. Ed. 1270, the Supreme Court sustained a conviction which had been attacked on fourth amendment grounds. The conviction was based on the testimony of a federal agent concerning a conversation between the accused and an undercover agent transmitted by an electronic device concealed on the person of the undercover agent to a receiving device over which the federal agent

listened. The court said (pp. 753-754): "The presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping. Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver, to be sure, but with the same effect on his privacy as if agent Lee had been eavesdropping outside an open window."

In *Lopez* v. *United States,* 373 U.S. 427, 83 S.Ct. 1381, 10 L. Ed. 2d 462, the Supreme Court upheld a conviction for attempted bribery of an internal revenue agent based on the testimony of an undercover federal agent concerning conversations which he had with the accused and the recording of one of the conversations made by a pocket wire recorder which he carried and which was introduced to corroborate his testimony. The court said (p. 438): "Once it is plain that Davis could properly testify about his conversation with Lopez, the constitutional claim relating to the recording of that conversation emerges in proper perspective."

Fourth amendment rights were again relied on in *Hoffa* v. *United States,* 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374. In that case, however, the Supreme Court upheld a conviction for jury tampering based on the testimony of a government informer who had gained access to the accused's hotel room by deception and testified to conversations which he had overheard. The court found no fourth amendment rights violated. See also *Lee* v. *Florida,* 392 U.S. 378, 381, 88 S. Ct. 2096, 20 L. Ed. 2d 1166; *Osborn* v. *United States,* 385 U.S. 323, 87 S. Ct. 429, 17 L. Ed. 2d 394; *Lewis* v. *United States,* 385 U.S. 206, 87 S. Ct. 424, 17 L. Ed. 2d 312; *Rathbun* v. *United States,* 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134.

On its facts, *Lopez* is directly in point as authority for the proposition that the recording of the April 2 conver-

sation was admissible. *On Lee*, *Lopez* and *Hoffa* establish the principle that the fourth amendment does not protect against the risk that the party with whom a defendant converses will not repeat, transmit or record the conversation, or allow it to be recorded. Applying this principle to the present case, the monitoring and recording of the telephone conversation was permissible and the recording was admissible.

The defendant claims, in effect, that the aforementioned cases are no longer good law. In support of his position he relies mainly on the interpretation which the United States Circuit Court of Appeals for the Seventh Circuit has given in *United States* v. *White*, 405 F.2d 838, to the decision of the United States Supreme Court in *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576. The *White* case is pending on appeal to the Supreme Court (certiorari granted, 394 U.S. 957, 89 S. Ct. 1305, 22 L. Ed. 2d 559) so that we may expect, in due course, a conclusive answer to the question with which, in the interim, we are presented by the present appeal.

In *Katz* v. *United States*, supra, the Supreme Court reversed a conviction based on evidence of the petitioner's telephone conversations which were overheard by FBI agents by means of an electronic listening and recording device which they had, without the knowledge of any of the parties to the conversation, attached to the public telephone booth from which he had made his calls. In *United States* v. *White*, supra, the Seventh Circuit, by a divided court, concluded that the *Katz* decision required a holding that, in the absence of a search warrant or court authorization, eavesdropping by a federal agent on a conversation between an informer equipped with an electric transmitter and the defendant who was unaware of the eavesdropping was a violation of the defendant's fourth amendment rights.

Exhibit A.

In *United States* v. *Kaufer*, 406 F.2d 550, aff'd, 394 U.S. 458, 89 S. Ct. 1223, 22 L. Ed. 2d 414, our own Second Circuit has reached an opposite result and expressly repudiated the interpretation of *Katz* made by the Seventh Circuit in *White*. The *Kaufer* case involved recordings of conversations by electronic devices and the use of an extension telephone. Internal revenue agents who listened in on the conversations testified about them and a tape recording of one of the conversations was admitted into evidence. The court said (p. 551): "A recording here, as distinguished from that in *Katz*, merely serves to preserve the consenting participant's recollection." Of the same tenor is *United States* v. *Polansky*, 418 F. 2d 444, 447 (2d Cir.).

The Circuit Court of Appeals for the Fourth Circuit has also disagreed with the *White* decision in *United States* v. *DeVore*, 423 F.2d 1069, saying (p. 1074): "Since the participants in a conversation are privileged to tell what was said, it necessarily must follow that a recording of what was said may either be used to corroborate the revelation, or simply as a more accute [sic] means of disclosure." See also *United States* v. *Jones*, 8 Crim. L. Rptr. 2017 (D.C. Cir.), *Holt* v. *United States*, 404 F.2d 914, 919 (10th Cir.), and *Dancy* v. *United States*, 390 F.2d 370, 371 (5th Cir.), all of which interpret *Katz* v. *United States* as not, sub silentio, overruling *On Lee, Lopez* and *Hoffa*.

The majority opinion in *Katz* v. *United States* does not expressly overrule any of the earlier decisions to which we have just made reference. On the contrary, Mr. Justice White, in his concurring opinion states (n.363), specifically that *On Lee, Lopez, Osborn* and *Hoffa* "are undisturbed by today's decision."

Undeniably, the court has painted with a broad brush in *Katz* in treating conversation as a subject of search and seizure protected by the fourth amendment whenever a person justifiably expects his conversation to be private.

Exhibit A.

On its face, the language of the court could be read to embrace a situation like the present. On closer examination, however, *Katz* involved a surreptitious eavesdropping on a conversation without the knowledge or consent of either of the speakers. It did not involve, as in the earlier cases referred to, the accurate recording of a conversation with the consent of one of the speakers. We consider that *Katz* holds that a person who made calls from the telephone booth had a reasonable expectation of not being overheard by third persons who would intercept his call unknown to him or to the recipient of his call. When a person has a conversation with another person, he relinquishes his right of privacy with respect to that person, and although he may complain of a breach of privacy by an eavesdropper, he cannot complain of a breach of trust by the person with whom he converses. See *United States* v. *DeVore*, supra, 1074. Whether in a face-to-face encounter or by telephonic communication, the person to whom he is speaking is free to relate the conversation provided, of course, that it is not a privileged communication. This fact is recognized in the earlier cases such as *On Lee*, *Lopez* and *Hoffa*. Quoting again from the concurring opinion of Mr. Justice White in *Katz*, supra: "When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa* v. *United States*, . . . [385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374]. It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another."

We conclude that there was no violation of fourth amendment rights in admitting the evidence objected to. The defendant adds the claim that the monitoring of the tele-

phone call violated the Federal Communications Act of 1934. 48 Stat. 1103, 47 U.S.C. § 605. That act as amended in 1968 is not applicable to the facts of this case. Moreover, the Omnibus Crime and Safe Streets Act of 1961; 82 Stat. 214, 18 U.S.C. § 2511 (2) (c); specifically authorizes such eavesdropping.

We turn then to the defendant's claim that one of the tape recordings was inadmissible because it was immaterial, irrelevant and fatally prejudicial. It should be noted at the outset that, so far as this appeal record discloses, the trial judge was never afforded an opportunity to know in advance the substance of the recording or to pass upon the question which is now raised. Consequently, we are not, in this instance, reviewing any action of the trial court on the grounds to be discussed. In his testimony the defendant had denied having had any discussion with the informer concerning narcotics. The recording of the April 2 conversation which we have described was offered in evidence on cross-examination of the defendant as already stated for the purpose of affecting his credibility on this point. When the recording was offered, the court inquired whether it was offered in contradiction of the defendant's testimony and the state replied that it was. The defendant objected, without stating any ground for his objection. The objection was overruled and the recording was marked as an exhibit, after which it was played. A transcription made of its contents was included in the exhibit. The state does not raise any objection that the technical requirements of our rules of practice were not observed, but seeks to sustain the admission of the evidence on the ground that, at this point in the case, the discrepancy between the defendant's testimony and that of the police informer was critical and that the evidence was relevant and material to show that the defendant did not "truthfully or accurately describe his conversation" with the informer on April 2,

the circumstances of which we have described. A review of the content of the recording leads us to the conclusion that justice requires our consideration of the relevancy, materiality and prejudicial nature of the material thus laid before the jury.

The transcription of the recording covers sixteen pages of the appendix to the defendant's brief, only four pages of which have any reference whatever to the subject of narcotics. The conversation commenced with the informer's statement that he had just been released on bail on a charge of receiving stolen goods but that his lawyer had said that he was going to get the evidence suppressed because of an alleged illegal search and seizure. The conversation then turned to the defendant's report of a crime in which two "[g]uys from out of town" took $3100 from a business concern. The conversation then continues for eight pages of the appendix to the brief with the defendant's description of a man who was in the habit of carrying large sums of money and the fact that he had seen this man "flash a roll of $100 bills" amounting to $5800 to $6000 "the other day". The defendant then described to the informer in detail how the informer could follow the man to his home at night and hold him up with a weapon and that he, the defendant, had "a Magnum 357" which he would loan to the informer for the holdup if the latter would return it promptly. The defendant offered to point out the victim's house to the informer and stated that the holdup could be accomplished on any night but that the quicker the informer did it the better because the proposed victim was carrying the money now. The defendant described the best method of entering the house and the proper locale in the house to accomplish the holdup. Other details, including the defendant's share of the proceeds, the informer's use of a rented car, and the defendant's suggestion that the informer "[g]rab a couple of plates somewhere and put one

on the front and one on the back" and then restore the owner's plates when the car was turned in.

It was after the foregoing discussion that the informer recalled "what else he was going to say" and then followed a discussion about the narcotics which Harb might have. The informer described the type of narcotics he wanted. The defendant stated he did not know what Harb still had but arranged to have the informer call him the next morning at 9:30 and, in the meantime, the defendant would "find out what he's got". This conversation was interrupted briefly by the defendant stating that he needed two portable, black and white, television sets.

It is unnecessary to discuss the obscenities with which the defendant's part of the conversation was garnished. It is sufficient to say that three-quarters of the conversation which was laid before the jury concerned the fact that the defendant was engaged in proposing and planning an armed holdup, describing the procedure and furnishing the weapon with which the crime was to be committed. That crime itself had nothing whatever to do with the charge of being an accessory to an attempted sale of narcotics for which the defendant was on trial. The evidence was offered, not to impeach the defendant's credibility by showing that he was a person of bad character, which the evidence would certainly serve to indicate, but it was offered to impeach his credibility by directly contradicting his testimony that he had never had the conversation of April 2 concerning narcotics with the informer. Nor did three-fourths of the conversation deal with any evidence of a prior conviction of crime.

The portion of the recording relevant and material to the crime for which the defendant was on trial was that relating to his participation in a sale of narcotics. Clearly enough that portion of the conversation was material, relevant and admissible to contradict the defendant's testimony

that he had never had the April 2 conversation with the inform. r concerning narcotics. To accomplish the purpose of contradiction, it would have been quite sufficient for the state to have offered only the portion of the recording relating to the conversation concerning narcotics. It is clear that the remaining portion of the conversation was highly prejudicial to the defendant and cannot be said to have had the probative value for which it was offered since the recording was offered only to discredit the defendant's denial of a conversation concerning narcotics.

It is well established that, as a general rule, evidence of the commission of other crimes unconnected with the crime for which a defendant is on trial is inadmissible. *State* v. *Holliday,* 159 Conn. 169, 172, 268 A.2d 368; *State* v. *Harris,* 147 Conn. 589, 599, 164 A.2d 399; *State* v. *Barnes,* 132 Conn. 370, 372, 44 A.2d 708. It is equally well settled that the mere fact that "evidence tends to prove the commission of other crimes by the accused does not render it inadmissible if it is otherwise relevant and material". *State* v. *Simborski,* 120 Conn. 624, 631, 182 A. 221. In fact, there are many exceptions to the general rule that evidence of other crimes is inadmissible. See *State* v. *Holliday,* supra, and cases cited. One recognized exception is that evidence of prior convictions may be used to impeach the defendant's credibility as a witness when he takes the stand in his own defense. General Statutes § 52-145; *State* v. *Marquez,* 160 Conn. 47, 48, A.2d .

Even if it were to be assumed that the evidence offered was admissible under an exception to the general rule, nevertheless, when evidence of other crimes is offered for some proper purpose, the question of whether its prejudicial value outweighs its probative value becomes a material consideration. *State* v. *Marquez,* supra, 52; *State* v. *Holliday,* supra, 173. For the reasons already indicated, the probative value of that portion of the recording which

we have described was unquestionably far outweighed by its prejudicial effect. The prejudicial effect of that portion of that recording requires that we order a new trial, although, even disregarding the improperly admitted evidence, there was sufficient evidence to support the verdict.

Upon the view which we take of the case, it is unnecessary to discuss the other assignment of error. It appears from the record that during the course of the defendant's trial the defendant Joseph Harb, who was on trial in the companion case, pleaded guilty. Consequently, in a retrial of this case the question of severance would not arise.

There is error, the judgment is set aside and a new trial is ordered.

In this opinion the other judges concurred.

Exhibit B.

APPENDIX B

CONTENT OF EXHIBIT EE, a taped recording and transcript thereof of the conversation of April 2, 1968 between the defendant and the informant at the defendant's place of business in Norwich and found in Volume III, pages 150-164 of the court transcript.

The Court: Are you offering this in contradiction to his present testimony?

Mr. O'Brien: I am, Your Honor.

The Court: You have a tape on it?

Mr. O'Brien: I do, Your Honor.

The Court: All right. Submit the tape in evidence. This is a conversation of April 2nd.

Mr. O'Brien: Yes, sir; conversation to which both David and Officer Salafia and Radgowski testified.

The Court: This may be marked as a full exhibit; EE.

Mr. Stewart: Objection.

The Court: Overrule the objection.

Mr. Stewart: Exception be noted.

The Court: Exception may be noted.

Mr. Jacobson: I take it Mr. Harb is not part of this conversation.

Mr. O'Brien: He is a part of the conversation with respect to narcotics.

Mr. Jacobson: He is not in this conversation.

Mr. O'Brien: No, sir, no.

Mr. Jacobson: No objection on behalf of the defendant Harb.

[Tape recording of conversation of April 2nd was received in evidence and marked State's Exhibit EE.]

[At this point, the recording of the conversation of April 2nd was played. The following is copied from a transcript which was made of this recording.]

Mortoro: What do you say?

Exhibit B.

David: (Undiscernible reply) . . . last night.

Mortoro: Last night. You know what happened, don't you?

David: No. I just got out on bail. (Conversation between Mortoro and customer.) Yeah. Receiving stolen goods they got me for.

Mortoro: That's bad.

David: That's not that bad. They're going to try to supress the evidence—whatever they—what do you call that?

Mortoro: You received—you didn't know they were stolen—and the guys . . .

David: Well, the lawyer said he was going to—he's going to—he said, 'Don't worry about it, because they are going to suppress the evidence'. That means they are going to throw it out of court. They made a search and seizure. They broke my trunk, you know, in the car. The thing is, uh, broken. They took the stuff out of there. What the hell, that's not right.

Mortoro: If they don't know that you, uh, know it was stolen there's nothing they can do.

David: Yeah.

Mortoro: If they don't say you—that you . . .

David: Well, he didn't say nothing about that but, uh . . . My cousin, Fred, is going to Florida?

Mortoro: Huh?

David: My cousin, Fred, is going to Florida?

Mortoro: When is he going?

David: S'what I heard. He's going to make it to Florida (laugh and short undiscernible conversation between Mortoro and David). Huh?

Mortoro: I heard he got a new car.

David: Yeah. He told me last time I talked to him that he was going to get a new Cadillac.

Mortoro: He's a funny duck. (Conversation with customers, partly inaudible telephone call made apparently by

Mortoro, and undiscernible conversation between David and Mortoro relative to the Rialto.) But they were crazy.

David: When?

Mortoro: You know why they were crazy? They go in there at night. And in the morning.

David: How many guys did it?

Mortoro: Two. Didn't need two. Two guys went in there and grabbed them in the morning. Took $3,100.00. $100 from the business. They could have got them at night. But his partner—his partner carries another four or five, and they would have got all the receipts.

David: Who? Anybody I know?

Mortoro: No. Guys from out of town.

David: Come from Providence?

Mortoro: Worcester.

David: From Worcester?

Mortoro: Yep.

David: I know guys from Worcester.

Mortoro: Well, that's who did it—couple guys from Worcester. Anyway . . .

David: Uh?

Mortoro: The guy that's got money now—you know Alfred Cohn?

David: Who?

Mortoro: Alfred Cohn—not Alix—Alfred.

David: Alfred Cohn?

Mortoro: Yeah.

David: C-O-N-E?

Mortoro: C-O-H-N.

David: Oh, Cohn. A Jew.

Mortoro: Yeah. He owns New England Glass and Mirror.

David: New England Glass and Mirror.

Mortoro: He carries nights (portion of sentence inaudible) . . . hundred dollars. He like to flash it. That's

his style. He's gotta carry it. Now if you see him go home—he gets out of the car—he comes—he's gotta go up the stairs. His house is like this, right? Here's the street. There's a door here he never goes in. He goes up the stairs here and goes in this way here. There's a hallway here and his door's here. When he gets out of the car here and he goes up like this here, if you don't . . . You could follow him right into there and just put the piece to him right there.

David: Right in the hallway.

Mortoro: Right in the hallway.

David: Can I do it tonight?

Mortoro: Sure you can.

David: Oh, oh, oh, wait a minute. Tomorrow night would be better.

Mortoro: It's up to you.

David: It can be any night, right?

Mortoro: Any night, but the quicker you do it the better, though. He's carrying it now.

David: All right. I'm going to tell you I'm going to lay it on the level here. The old lady threw away the piece that I had. I ain't got no piece.

Mortoro: You've got to get a piece.

David: You haven't got no piece at all? Anything. I don't give a shit. Even if it's a toy, I don't give a shit. What the hell's the difference? He's not going to . . .

Mortoro: Oh, he'll never know the difference.

David: Can you get me a piece?

Mortoro: I got a—I got a Magnum 357—this big.

David: That's good enough.

Mortoro: I got to have it right back.

David: Right back. As soon as it happens. All right, now, what do you think he's got on him?

Mortoro: At least from a thousand up.

David: That's all?

Exhibit B.

Mortoro: I'm just telling you, from a thousand up. I don't know what he's got. Sometimes I see. Counted it in front of me—6G's—the other day.

David: How much you want out of it, now? Now, let's be on the level, now. Whatever it is . . .

Mortoro: Whatever comes to you. Give me a piece. If you don't want to I don't give a damn.

David: No, no, no . . .

Mortoro: I don't want any half, I don't want any three-quarters—none of that shit.

David: Well, just tell me what you want, then. 'Cause what I want—what I want to do is, I want to do it—I hope it's enough so I can get the hell out of here. You know what I mean? 'Cause I don't want to stay. I just want to do that. Hit and run—that's it. You know? Uh . . .

Mortoro: Well, you don't think you want to . . .

David: Well, no. I want to take everything. I mean, I'm going to go in the apartment, too. I will go right in his house.

Mortoro: You know his apartment? In his apartment . . .

David: Does he have a safe in there? He must have a safe. If he takes it home he's gotta have something.

Mortoro: Yeah. Here's what happens. You know what happens. There's a little safe. They took it out of there since then. Since then we're thinking that he puts the money in his powder box. He might have and he's got a dark room in there and he develops pictures and shit.

David: Do they get any money on those things?

Mortoro: Nine G's.

David: Oh, they got nine G's out of that already?

Mortoro: Sure.

David: Then he's not a fool to carry around money with him . . . Oh, a couple of years ago.

Mortoro: 'Bout four years ago. Got nine G's out of him in the top—in the container they had there. Got about ten

thousand. He's always got this. Now when you go in the house—you follow him in the house.

David: Good. That's what I'm gonna do. When I do it I'm gonna do it all the way.

Mortoro: You'll have him in the dark room.

David: You know what I mean, I gotta . . . (knock heard on door).

Mortoro: Come on it. (Short exchange of conversation between Mortoro and woman employee. Woman leaves and closes door). I would be a lot more—in his house—his wife might be there.

David: I don't care. I don't care. And listen, uh—go in the dark room. Do you think I should do it alone, or you got somebody else to go in there?

Mortoro: Aw, you probably got to do it alone. What are you going to cut—18 guys in, for Christ sakes?

David: Well, I know, but I figured maybe another guy if somebody else is in the house, you know.

Mortoro: You walk on right in the house. You say, 'Alfred . . .'

David: His name is Alfred?

Mortoro: I would call him Alix.

David: Alix.

Mortoro: And he'll think that you got him twisted with his brother.

David: Yeah.

Mortoro: Say, 'You mother-fucker, you're going to die tonight if I don't get any money from you.'

David: That's all.

Mortoro: And he'll shit green.

David: He's scared of me, especially with that 357, right? Jesus Christ, that son-of-a-bitch will go through a car block. Uh . . .

Mortoro: What are you going to do when he gets out of the . . . Here's the street. He gets out of the car,

he parks the car here and he walks up the stairs like that and goes in this door. In this door there's a nice hallway, and this is the door to his house. Now what you could do is wait until he gets out of the car and starts walking up and follow him up. Hi! (Woman's voice replies, 'Hi!') Eddie, this is my wife.

David: How do you do. I think I met you before. I'm not sure.

Mrs. M: I don't know. (Undiscernible short conversation between Mortoro and wife.)

Mortoro: Freddy bought a car?

David: Bought a new Cadillac?

Mortoro: Cadillac?

David: He told me he was going to buy it. You know?

Mortoro: (Reply unclear)

David: Well, uh, they got him—they gave him a year for, uh, what was it—obtaining money.

Mortoro: I don't know what it was—a check . . .

David: A check. Checks, or something.

Mortoro: Yeah, from his wife.

David: From his wife! Well, how the hell can they, uh, checks from his wife?

Mortoro: Well, he signed his wife's name or something.

David: That doesn't make any difference. It's your wife or you—it's—it's the family. How many times has my wife signed a check when she's . . .

Mortoro: Well, I know it. You'd never think you would get convicted, but he was.

Mrs. M: Well, when you go to court it's a different story.

David: Well, I don't know how the hell they . . .

Mortoro: Hey, do you know Mike Delesio? He owed the band $250 and gave them a check. Right? He lost $30,000. He lost everything he owned. So he had the check and so they turned it in. For collection they went to the cops. So he went to the guy and said, 'Here's the $250',

and the guy wrote a nice note. 'The check has been refunded, he has given me the money back, I, personally do not want to press any charges whatsoever against this man.' The guy signed it and everything. He went to Dean and he said, 'Nothing doing. You're going to court.'

Mrs. M: How could they make him go to court on that?

Mortoro: He could go. I don't know how, but they do it.

Mrs. M: He made restitution. The people accept it and don't want to press charges.

David: I made restitution on what I did last year and I still went to jail.

Mrs. M: This I don't understand.

Mortoro: Because you broke a law. That's (inaudible conversation between Mortoro and employee.)

David: Well, uh, I got—for one thing, I got to get another car because this . . . I got a '59 Nash and it's got the muffler, this . . . (makes sound of noisy engine) . . . loud noise, you know what I mean?

Mortoro: (Laugh)

David: I got another car. I got one in Hartford. I can—I'm gonna rent it. That's what I'm gonna do. Under different license. (Conversation between Mortoro and employee.) The car's running on about four cylinders. I got it out here. Yeah, my wife and I.

Mortoro: It's no good.

David: Uh, it's no good. No. I can't use it. So what I'm gonna do is rent a car and I figure, well, tomorrow night or the night after—any night is . . . Do you think the weekend is the best?

Mortoro: No. Whenever you catch the buy is the best.

David: I figure maybe the weekend and he has the—more, uh . . .

Mortoro: If—this guy likes to flash a roll of hundred dollar bills—the other day counted $6,000—$5,800.

Exhibit B.

David: Yeah.

Mortoro: Likes to carry money. Now, in his house he's got a . . . See, when you go in the house, you got up the stairs—the hallway—there's a doorway here. He's got a dark room in there and he keeps a little safe. I don't know if he's still got it there now. He keeps the money there and he never locks it. Never locks it.

David: You don't think his old lady would give me any trouble, do you?

Mortoro: No. None whatsoever. None whatsoever. I don't know if you'll take any money home. That I won't guarantee.

David: I've gotta look at the . . . Hey, if I'm in the house I might as well, you know, I have to, uh . . .

Mortoro: I'd tie him up.

David: I'm gonna. I got that EB tape at home. You know, that thick tape.

Mortoro: Tie him up and then get the fuck out.

David: That's what I'll do.

Mortoro: You know what I say to you? Say, 'You know, don't mess with me because you fucked the guy in Worcester, you ain't gonna fuck nobody else.' Cause see, he got pinched. He didn't get pinched . . .

David: What guy in Worcester?

Mortoro: I'll show you something. He had a charcoal place.

David: Yeah.

Mortoro: He rented it to a Greek. He said to the Greek, 'Here's a couple thousand, get it burned for me.' So the Greek hired a guy from Worcester. And he hired two kids from Worcester, and they burned the fucking joint. What do you think—one of the kids gets burned bad. So the cops pick him up in Worcester and they're gonna extradite him here, and this Jew was shitting green. He was scared shitless. See.

Exhibit B.

David: Um.

Mortoro: So he thinks the guys from Worcester are gonna nail him. So all you got to say to him, 'Look, I didn't come down from Worcester for my fucking health.'

David: So I'll make him think I'm from Worcester. Yeah.

Mortoro: Say, 'This money will help Roche.' That's the name of the guy. See, right away the heat will go off for him. (Undiscernible sentence).

David: Roche is the name of the guy that fucked him before?

Mortoro: Yeah.

David: Oh, he's the one that got the Rialto, is he?

Mortoro: Roche did and another guy.

David: Roche did and another guy!

Mortoro: Christ, right now if you want to put a piece on him you could get a nice little bundle of "C" notes.

David: Right now? Yeah, but I like to get him when there's enough. You know what I mean? When there's . . .

Mortoro: I don't know when there's enough.

David: I gotta wait. Friday night, or whenever it is, you know, and I'll wait because it's better to do it when he's got, you know, you know what I mean, Orts?

Mortoro: I advise you to do it this way. Don't hesitate or nothing, will you. I'll show you the house now. I'll show you . . .

David: Hey, close that door. I can't hear you.

Mortoro: Go ahead.

David: See, now I got my wife and two kids with me. You know what I mean? I don't want her to know nothing from nothing. You know what I mean? But, uh . . . Huh?

Mortoro: Well, I wouldn't show it.

David: No. No. But the thing is, I'm gonna rent the car.

Exhibit B.

Mortoro: Yeah.

David: That's what I gotta do because I've got another license, you know what I mean, and I've got another registration. I've got the whole set of identification that I need. I'm gonna rent the car. I've got the car already, you know. Then rent the new car—whatever it is—it's $18.00 a day. And that's what I gotta do and I'm gonna ditch the car. What am I gonna do. Right? (Inaudible question by Mortoro.) It's the best best. No. I told you I got a whole new set of identification, you know, license and everything else.

Mortoro: Your best bet is rent a car.

David: That's what I'm gonna do.

Mortoro: Grab a couple of plate somewheres, put one on the front and one on the back.

David: I got the plates already home. I'm . . . ahead of you.

Mortoro: So you rent the car and put the plates on. Right?

David: Right.

Mortoro: And take their plates off. You do the job. You take those two plates off, put their plates back, and turn the car back.

David: Turn the car back in. Right. Yeah. Now you ~~say~~ you got the piece. I can have the piece.

Mortoro: Right.

David: I can have the piece.

Mortoro: I want that piece back . . . (remainder of sentence not clear).

David: Oh, hey. Listen. Right after the thing is done. You know . . .

Mortoro: I need the piece.

David: OK. Uh, now, what else was I going to say. Another thing, too—how about (undiscernible question re Joe Harb).

Mortoro: I don't know what the fuck he's got left now.

Exhibit B.

David: Has he got something? Because, you know . . .

Mortoro: I don't know what the hell . . .

David: Listen. I don't use no more. You know. I'm going to be level with you. I don't. You know what I mean?

Mortoro: It's not up to me. You know what I mean; I don't know what he's got left.

David: Yeah.

Mortoro: He had a lot of shit.

David: But, uh, the thing is, uh, I'd like to get ahold of some because I can really . . . You know what I do with them pills? With the water you crush them. One pill—sell it for $10.00. You understand what I mean, Orts? You crush them—crush them, make them power and it sells for heroin. You can sell it for $10.00 a pill. What the hell. In Hartford, I'm telling you the . . . And it will go just like that. Just like that! That's money. And you know, I'll tell you, it's just like pulling a cork out of a bathtub. You know, you see the streets are full one minute and then the next minute it's just like pulling a cork out of a bathtub. When you come on the streets they all come with the money. I don't know where they get the money, those guys. Two, three, four bags. I means, that's money. Forty or fifty dollars on each guy. You get about, uh, 25-30 guys all at once. What the hell. You know? All you got to do is crush up the pills—that makes a bag.

Mortoro: What kind of pills you want?

David: Dilaudid. You know he's got that.

Mortoro: What—what are they?

David: Dilaudid. I mean, you told me that . . .

Mortoro: I don't know what the fuck he's got.

David: Yeah. He's got nothing to do with . . . He's got morphine. Right?

Mortoro: He got every fucking thing. I don't know whether he got rid of some fucking . . .

Exhibit B.

David: Gees, I hope he didn't get rid of the dilaudid. You know, the opiate. Any opiate. Any opiate you can crush up and pass it off for the stuff. Now, you understand? I know this business. You know what I mean? And, uh . . .

Mortoro: You know, I heard stories about Freddy turning—turning somebody in once.

David: Yeah, he did. Freddy turned me in once. You know?

Mortoro: I know he turned somebody in.

David: He—he was going to and then, uh . . . Yeah. Which one did you hear he turned in?

Mortoro: I don't know. I . . . One of the cops told me.

David: What cop?

Mortoro: State cop.

David: A state cop!

Mortoro: . . . Freddy one time turned somebody in.

David: A state cop! Gee, I know a lot of city cops that, you know, wanted me to get them TVs and washers and shit like that, but I never heard of a state cop . . .

Mortoro: I need—I need two TV's now I gotta get a good buy for.

David: Yeah. Two portable color, huh?

Mortoro: No. Two portable black and white, I think.

David: Black and white? Used? Doesn't matter if it's used, does it?

Mortoro: Well they don't care but, I mean, I need two of them.

David: Ah, well, all right then, I'll tell you what. Let me—definitely I'll either—definitely, uh, rent the car tomorrow and come down or I'll definitely call you in the morning. But you're never here. Every time I call you . . .

Mortoro: Well, I'm here. A lot of times they say I'm not here. I'm not here because I don't want to be here.

Exhibit B.

David: Oh, well. Give me a definite time where I can call you in the morning.

Mortoro: You call me here tomorrow morning at 9:30 and I'll . . .

David: 9:30 in the morning I'll call you up here. 9:30.

Mortoro: Right.

David: OK?

Mortoro: In case of an emergency and I gotta leave, you tell Joe that 'This is Eddie and Ort—does Ort need work for me?'

David: OK. Good enough.

Mortoro: I'll be here at 9:30.

David: OK, Ort. I'll see you then. Let me take the—I gotta take my wife and kids. Christ, that god-damned car—wait till you hear it. It sounds like a truck. The mufflers are gone and everything else. They repossessed the other one, you know. The new Mercury.

Mortoro: Yeah.

David: And you know what for? We didn't pay the insurance on it. We had the payments up to date. No insurance—they repossessed it.

Mortoro: All right.

David: OK. I'll call you at 9:30 in Norwich. Hey, Ort. Call up, uh, can you call up Joe Harb and see if he's got any of that, uh, you know . . .

Mortoro: He's not open until about quarter of six.

David: Well, let me know in the morning—9:30, OK, what he's got.

Mortoro: (Undiscernible reply)

David: What I need is opiate. Opiate.

Mortoro: I'll find out what he's got.

David: OK. (Door slams).

[Playing of tape is concluded.]

s Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORT MORTOKO,

Appellant,

against

JOHN C. MANSON, Commissioner of Corrections
for the State of Connecticut,

Appellee.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 3rd day of April, 1974, he served two copies of the Appellee's Brief and Appendix on Richard R. Stewart, Esq.

the attorney for the Appellant by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. 750 Main Street, Hartford, Conn. (xxxxxxxx., that being the address designated by him for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this
3rd day of April, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976